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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 853

POWELL GLASS, JR., ET AL.,
Appellants

vs.

HANCOCK COUNTY ELECTION COMMISSION, ET AL.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JURISDICTIONAL STATEMENT

This is an appeal by Powell Glass, Jr., et al. from the final judgment of the Supreme Court of the State of Mississippi rendered on October 21, 1963, affirming the decree of the Chancery Court of Hancock County, Mississippi, rendered on the 28th day of February, 1963, by which a general demurrer to the Bill of Complaint was sustained on the ground that there was no equity on the face of the Bill for the reason that there was a plain and adequate remedy at law. This Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The unreported opinion of the Chancery Court of Hancock County, Mississippi rendered on the 27th day of February, 1963 is attached to this Jurisdictional Statement as Appendix A, infra, at p. 14.

The decree of the Chancery Court of Hancock County, Mississippi rendered on the 28th day of February, 1963 is attached to this Jurisdictional Statement as Appendix B, infra, at p. 17.

The opinion of the Supreme Court of the State of Mississippi is reported in 156 So. 2d 825 (October 21, 1963), and is attached to this Jurisdictional Statement as Appendix C, infra, at p. 18.

The judgment of the Mississippi Supreme Court dated October 21, 1963 is attached to this Jurisdictional Statement as Appendix D, infra, at p. 28.

JURISDICTION

Appellants brought an original action for injunction in the Chancery Court of Hancock County, Mississippi to restrain the defendants and their successors in office from performing all acts incidental to, or necessary in, the holding of elections for members of the Hancock County Board of Supervisors under the presently existing supervisor districts of said county, until such time as the said Board of Supervisors of Hancock County shall redistrict their said county in accordance with the Constitution and statutory laws of the State of Mississippi; and praying that said defendants be mandatorily required to declare the next General Election for members to the Hancock County Board of Supervisors on a county-at-large basis, or, in the alternative, that the Court redistrict said county in conformity with the constitutional and statutory requirements; that upon a final hearing the temporary injunction be made permanent and perpetual, and appellants prayed for general relief. Appellants' Bill of Complaint asserted that the failure to redistrict Hancock County violated the provisions of *Section 2870 of the*

Mississippi Code of 1942, Annotated (Recompiled); that said statute violated *Section 170* of the *Mississippi Constitution of 1890*, and that said failure to redistrict said county violated the due process clause and the equal protection clause of the *Fourteenth Amendment* to the *United States Constitution*.

The action was brought pursuant to *Section 159* of the *Mississippi Constitution of 1890* and *Section 1657* of the *Mississippi Code of 1942, Annotated (Recompiled)* authorizing original and exclusive jurisdiction of injunction in the chancery courts.

Following initial hearing in the Chancery Court of Hancock County, Mississippi, appeal was perfected to the Mississippi Supreme Court, and upon full hearing on briefs and oral argument, the Mississippi Supreme Court rendered its opinion and judgment on October 21, 1963, unanimously affirming the trial court decree sustaining general demurrer and dismissing appellants' Bill of Complaint. The shortness of the time intervening between the Mississippi Supreme Court's decision and the date of the General Election sought to be enjoined (November 5, 1963) prevented the filing of a Suggestion of Error, appellants preferring to immediately perfect appeal to the United States Supreme Court in order to apply for a stay of the judgment pending perfection of the appeal to the United States Supreme Court. Motion to stay the judgment pending perfection of appeal was filed in the Mississippi Supreme Court on October 22, 1963, and denied by that court on October 29, 1963. Motion to stay the judgment pending perfection of the appeal was filed in the United States Supreme Court on October 30, 1963, and denied by Mr. Justice Black on October 31, 1963.[5]

Notice of appeal to this Court was filed with the Mississippi Supreme Court on October 24, 1963. The time for the filing of this Jurisdictional Statement and docketing this appeal was enlarged on December 23, 1963 to February 23, 1964 by order of the Mississippi Supreme Court.

The jurisdiction of the United States Supreme Court to review the decision of the Mississippi Supreme Court by appeal is conferred by *28 U.S.C. Section 1257 (2)*. A "statute of any state" therein mentioned encompasses state constitutional provisions. *Railway Express Agency v. Virginia, 282 U. S. 440; Adamson v. California, 332 U. S. 46.*

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Baker v. Carr, 369 U. S. 186, 7 L. Ed. 2d 663; Gomillion v. Lightfoot, 5 L. Ed. 2d 110, 29 U. S. L. Week 4024, (Nov. 14, 1960); U. S. v. Cruikshank, 92 U. S. 542; Nixon v. Herndon, 273 U. S. 536; Smiley v. Holm, 285 U. S. 355; Colegrove v. Green, 328 U. S. 549; Turman v. Duckworth, 329 U. S. 675; Cook v. Fortson, 329 U. S. 675; Terry v. Adams, 345 U. S. 461; Cooper v. Aaron, 358 U. S. 1.*

THE STATUTE INVOLVED

Section 2870 of the *Mississippi Code of 1942*, Annotated (Recompiled) (Vol. 3, p. 4) is set forth in Appendix E, infra, at p. 29.

Section 170 of the *Mississippi Constitution of 1890* is set forth in Appendix F, infra, at p. 31.

Amendment XIV, Section 1 of the *United States Constitution* is set forth in Appendix G, infra, at p. 32.

QUESTIONS PRESENTED

I. Does the failure to redistrict a county board of supervisors (like failure to reapportion a state legislature) violate the equal protection clause of the *Fourteenth Amendment* when such failure results in an asserted invidious discrimination?

II. Does a statute, patently unconstitutional on its face, afford a plain and adequate remedy at law?

III. Does a plain and adequate remedy at law exist when its only utilization is dependent upon implementation through referendum and initiative?

IV. Does the *Fourteenth Amendment* require, as a condition precedent to its invocation, the exhaustion of administrative remedies?

V. Does a suit duly brought in a state court of otherwise competent jurisdiction, challenging the failure to redistrict a county board of supervisors possessing quasi legislative authority wherein, inter alia, taxes are levied, on the grounds of asserted conflict with the *Fourteenth Amendment to the United States Constitution*, present a justiciable controversy of which such court has jurisdiction and the power to render relief?

STATEMENT OF THE CASE

Appellants, as citizens, taxpayers and voters of the United States and the State of Mississippi, Hancock County, brought suit in the Chancery Court of Hancock County, Mississippi, on behalf of themselves and others similarly situated to enjoin the Hancock County Election Commission, the individual members thereof and their successors in office, from holding or certifying elections to the Hancock County Board of Supervisors under the presently defined supervisor districts on the grounds that the disparity of population, assessed valuation and qualified electors in the several supervisor districts creates, and results in, an invidious discrimination against appellants and others similarly situated. The board of supervisors is composed of five members, one from each supervisor district, and each supervisor may cast one vote in all matters before the board.

Exhibit A to the Bill of Complaint reflects the population established by the 1960 Federal Census, the assessed valuation and the qualified electors of the respective five supervisor districts (Beats) to be as follows:

BEAT	POPULATION	ASSESSED VALUATION	QUALIFIED ELECTORS
1	1,333	$ 976,090.00	421
2	869	$ 460,078.00	318
3	1,147	$ 327,055.00	400
4	1,838	$ 955,170.00	645
5	8,853	$6,835,288.00	3,040

No evidence was produced because the trial court sustained the general demurrer filed by one of the three election commissioners. For the purposes of the demurrer, the allegations of the Bill of Complaint and the exhibits, were admitted as true. Therefore, the asserted invidious discrimination, as well as the disparity reflected by Exhibit A to the Bill are admitted. Supervisor District No. 5 has more population than the other four districts combined (8,853 to 5,187); its assessed valuation is more than twice the combined assessed valuation of the other four districts ($6,835,288.00 to $2,718,393.00) and its qualified electors are almost double the combined number of qualified electors in the other four districts (3,040 to 1,834).

Notwithstanding such shocking and incredible disparity, District 5 has only one supervisor with one vote while the other four districts have four supervisors with a combined vote of four.

Moreover, the Bill of Complaint alleges that as a result of the recent acquisition of thousands of acres of land in Hancock County, principally in District No. 2, by the United States Government to be used by its space agency in the development and manufacture of missiles and rockets for Moon and interplanetary exploration, Supervisor District 2 has, for all practical purposes ceased to exist insofar as residential population and assessment for taxation is concerned.

The federal questions raised were by the initial pleading (the Bill of Complaint) filed in the trial court and the same questions were presented to the Mississippi

Supreme Court on appeal, all of which were argued both orally and by written brief to both state courts.

At the conclusion of the argument on the demurrer in the trial court, the chancellor rendered his oral opinion (Appendix A, p.14) by which he sustained the general demurrer, but without passing upon the federal questions invoked. Thereupon, counsel for the appellants requested of the chancellor a ruling on the federal questions invoked, but this request was denied by the chancellor (Appendix A, p. 14), the only "federal" reference found in the chancellor's oral opinion is contained in his observation: "Our Nation and State are today confronted with many grave and perplexing problems because too many judges, particularly in the Federal appellate courts, have exercised what many able lawyers and judges classify as personal discretion rather than sound judicial discretion." (Appendix A, p.14). The quoted observation of the learned chancellor will be paraphrased and argued in the brief on the merits.

In both the trial court and the Mississippi Supreme Court, this court's decision in *Baker v. Carr, Supra*, was argued extensively for the obvious reasons that the legal questions in that case and in the case at bar are identical. The trial court only observed in its oral opinion (Appendix A, p.14) that there was a vast difference in reapportioning supervisor districts and reapportioning state legislatures. The Mississippi Supreme Court, in its opinion (Appendix C, p.18) discussed this court's holding in *Baker v. Carr, supra*, but affirmed the trial court in sustaining the general demurrer, and observed by way of obiter dictum, that "It is possible that there will be more people in that locality (District 2 taken by NASA) than there were before the Government took over." It is assumed that this court will take judicial knowledge that NASA prohibits human habitation within the confines of its testing area.

The Mississippi Supreme Court's criticism[1] of the manner in which this case was filed is contrary to this court's approval of the manner in which the case of *Baker v. Carr, supra,* was brought. in *Baker, supra,* the Tennessee General Assembly was not made a defendant, and, similarly, in the instant case, the Board of Supervisors was not made a defendant. Both suits were in equity.

The Mississippi Supreme Court in its written opinion (Appendix C, p. 18) quotes in full *Section 170* of the *Mississippi Constitution* and *Section 2870* of the *Mississippi Code.* The constitutional section provides that a majority of the board may transact business, but the statute requires the unanimous vote of the elected board in order to redistrict the county, and it is this same section, without a saving clause, which attempts to provide initiative and referendum as the plain and adequate remedy at law upon which the lower courts sustained the general demurrer.

Moreover, it is interesting to note, and it is indeed paradoxical, that the Mississippi Supreme Court cited both federal and state cases which granted relief in reapportionment in support of its position denying such relief. The court cited; *Baker v. Carr, supra; Magrau v. Donovan, 159 F. Supp. 901; Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A 2d 705.* The Mississippi Supreme Court did not pass on the federal questions invoked.

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1. "The anomalous situation in this case is that the appellants seek the aid of a court of equity because there is clearly no adequate remedy at law. The relief sought is injunction, and to enjoin a governmental party that is not made a party to the suit, i. e., the Board of Supervisors, though the prayer of the bill seeks to enjoin the Hancock Election Commissioners from holding further elections to beat offices until such time as the Board of Supervisors of the county shall redistrict their county as required by law, or, in the alternative, that the court redistrict the county."

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents constitutional questions of serious import, clearly requiring plenary consideration with briefs on the merits and oral argument for their resolution.

This Court's action on November 21, 1960, noting probable jurisdiction in *Baker v. Carr, supra*, October term, 1960, No. 103, and subsequent opinion rendered therein on March 26, 1962, should alone serve as a clarion call that the questions herein presented are substantial.

Every argument for this Court's accepting jurisdiction in *Baker v. Carr* is increasingly present here.

Without implying a quantitative test or a qualitative difference, the dilution of appellants' votes in the present case is mathematically greater than appellants in *Baker v. Carr*. Each vote of appellants, compared with that of the vote in the most over-represented supervisor district, is but 1/10th based on the 1960 Federal Census, and will likely be less than 1/100th when NASA takes over the district in the near future for test operations. The legitimate grievance, then, of the Tennessee urban dweller pertains with equal or greater vigor to his Mississippi counterpart.

Moreover, the failure to redistrict over a long number of years is tantamount to affirmative action by the Board of Supervisors to maintain the existing discrimination. The presently constituted supervisor districts are not founded upon any recognizable or acceptable criteria -- neither population, assessed valuation nor qualified electors, nor any combination thereof. The present districting thereby violates the familiar precept that any classification enactment, *regardless of subject matter*, is infirm under the *Fourteenth Amendment* when not "rooted in reason", *Griffin v. Ill.*, 351 U. S. 12, 21 (1953) or based on "rhyme or reason", *Goesaert v. Cleary*, 335 U.S. 464 (1949). We have reached, in fact, the situation posed

hypothetically by Mr. Justice Douglas in *MacDougall v. Green*, 335 U.S. 281.

> "'None would deny that a State law giving some citizens twice the vote of other citizens in either the primary or the general election would lack that equality which the Fourteenth Amendment guarantees.'"

The failure to redistrict indicates a serious constitutional deprivation of the franchise and to the right of fair classification generally, which this court, in other contexts has never hesitated to correct. Not only do general substantive precedents support appellants, but this Court's holdings in *Baker v. Carr, supra*, are clearly decisive. In that case, this Court held:

> "Appellants' claim that they are being denied equal protection is justiciable, and if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.'"
>
> The Court also held in that case:
>
> "A state court's inability to grant relief does not bar a federal court's assuming jurisdiction to inquire into alleged deprivation of federal constitutional rights."

Mr. Justice Brennan concluded the majority opinion in *Baker* thusly:

> "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision.

> The right asserted is within the reach of judicial protection under the Fourteenth Amendment.'

On August 1, 1962, the Office of Legislative Counsel of the State of California issued its official opinion in response to an official inquiry as to "whether the rationale of the United States Supreme Court case of *Baker* v. *Carr* would support an action attacking the apportionment of county supervisorial districts." The response contained in the opinion was in the affirmative. This opinion, rendered by Terry L. Baum, Deputy Legislative Counsel, holds:

> "We assume a case in which suit is brought pursuant to Section 1983 of Title 42 by electors in a supervisorial district which, the electors claim, has been created by the board of supervisors arbitrarily and capriciously (see Sec. 25200, Gov. C.), e.g., it has a population greatly in excess of other districts so that the vote of the electors bringing the suit and that of other electors in the district is greatly diluted, and thus these electors have been denied equal protection. It appears to us that each of the three questions answered in the Baker case would be answered the same way in such a case. That is, the claim of denial of equal protection (not so attenuated and unsubstantial as to be absolutely devoid of merit) would give the court jurisdiction (See 7 L. Ed. 2d at p. 675). That the plaintiffs who assert the denial of equal protection allege disadvantage to themselves and seek to protect or vindicate an interest of their own, as well as of those similarly situated, would, as in the case of the plaintiffs in the Baker case, provide standing to sue (see 7 L. Ed. 2d at pp. 678-680)."

Moreover, the public statements of the Mississippi

Attorney General, Honorable Joe Patterson, and his Assistant Attorney General, Honorable Martin McLendon, given to the UPI, as reported in the Memphis, Tennessee Commercial Appeal on page 15 of its publication dated February 25, 1963, in connection with the filing of this suit, are not only pertinent, but persuasive and indicative of the considered opinion of high public legal authority within the state. In this press release, Attorney General Patterson is quoted as saying: "'If courts are going to compel reorganization of legislatures on what they determine to be more equitable bases, then by the same precedent they can compel counties to reorganize supervisor districts and municipalities to reorganize wards.'"

The same article reports Assistant Attorney General Martin McLendon, as saying: "'The decision (Baker v. Carr) struck down the autonomy of state legislatures and cleared the way for such a suit.'"

The legal principles involved in *Tedesco v. Board of Supervisors*, 43 So. 2d 514, 339 U. S. 940, are identical with those in the instant case. In *Baker v. Carr, supra*, this Court held that its position in *Tedesco* "indicates solely that no substantial federal question was raised by a state court's refusal to upset the districting of city council seats, especially as it was urged that there was a rational justification for the challenged districting." Mr. Justice Clark, in his concurring opinion in *Baker*, commented on this Court's decision in *Colegrove v. Green, supra*, and stated: "Moreover, the appellants did not present an equal protection argument." To this observation by Mr. Justice Clark in *Baker v. Carr, supra*, is a footnote which reads -- "Similarly, the equal protection clause was not invoked in *Tedesco v. Board of Supervisors*."

The instant case is distinguished from *Tedesco* in that (a) the equal protection clause is invoked here and (b) it is here urged that there is no rational justification for the challenged districting.

Moreover, the effect of the holding by the Fifth Cir-

cuit Court of Appeals in *Mitchell v. Wright, et al*, 154 F. 2d 924, is that is is not necessary to first exhaust administrative remedies where there is an alleged violation of individual rights, and this position is supported and discussed at length by Mr. Justice Frankfurter in *Lane v. Wilson*, 1938, 307 U. S. 268, 59 S. Ct. 872, 83 L. Ed. 1281.

The anomaly which makes the alleged discrimination in this case so glaring is the fact that it exists in the very heart of the precincts of the citadel of States' rights.

CONCLUSION

The questions at hand are at least of equal urgency, merit and national importance to those which recently impelled this Court to grant full hearing in *Baker v. Carr* and to thereafter afford relief in that case. The under-represented voters of Hancock County, Mississippi, as those of Tennessee and elsewhere, cry out to this Court to be heard against the invidious discrimination that makes a mockery of their right of franchise, against the subtle, as well as overt dilution of their votes as otherwise guaranteed by this Court under the *Fourteenth Amendment* and other amendments, and against an arbitrary and capricious classification which for that reason alone must surely offend familiar *Fourteenth Amendment* obligations.

Appellants therefore pray that this appeal be granted and that full hearing be had.

Respectfully submitted,

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Dated: February 10, 1964.

APPENDIX A

STATE OF MISSISSIPPI, IN THE CHANCERY COURT

COUNTY OF HANCOCK, FEBRUARY TERM, 1963

POWELL GLASS, JR., Et Al. COMPLAINANTS

V. No. 9063

HANCOCK COUNTY ELECTION COMMISSION, Et Al. DEFENDANTS

ORAL OPINION OF THE CHANCELLOR

Gentlemen, good and solid citizens have initiated and are involved in this litigation and the Court neither censors nor questions the good faith of any party to this litigation. The Court has long recognized that attorneys advocate but the courts must decide the issues presented to them.

Now this cause is now before the Court on general demurrer and the purpose of a demurrer, of course, is to test the legal sufficiency of the Bill of Complaint. That is, does the bill of complaint state enough to allow the complainants to proceed to proof in a court of equity. The demurrer does admit all facts well pleaded.

Now, the court must look to the entire bill in determining its legal sufficiency, and in doing so the court finds Complainants citing and referring to Section 2870 of the Mississippi Code of 1942, Recompiled. The Court does and must take judicial notice of the pertinent statutes of Mississippi.

Now, injunction is an extraordinary remedy. The rule is and has long been established that injunction will not issue if there is a complete and adequate remedy at law.

Section 2870 of the Recompiled Mississippi Code of 1942, is in the opinion of the Court, such a remedy. The provisions of Section 2870 of our present Code have been a part of the Statute Law of this State for more than 100 years and since the year 1848. So far as this Court is aware, it has never been successfully contended that this particular section of our Code fails to furnish an adequate legal remedy for the conditions complained of by Complainants in the Bill or Petition now before the Court.

The matter of apportionment or reapportionment is essen-

tially a legislative function. The Board of Supervisors is both a quasi-legislative body and a quasi-judicial body. The question of reapportioning supervisor districts is a vastly different matter from reapportionment of the Legislature of the State. When the State Legislature failed or refused to exercise the legal discretion vested by the Mississippi Constitution in the legislators when all requisite conditions existed for which such legal discretion was created, there was then a failure of a branch of government to function or it could be called a break-down in the function of government which failed to accord the judicially recognized right of fair reapportionment to the citizens of the State and for which there is or was no adequate remedy at law and thus resort to a court of equity was proper.

If in the matter of supervisors districts the board of supervisors does not or will not by unanimous vote change or alter the districts as they are expressly authorized to do by the first paragraph of the cited section of our present Mississippi Code, that is, Section 2870, then upon petition of 25 percent of the qualified electors of the County, the Board of Supervisors is required to call a special election in not less than thirty days nor more than sixty days from the date of presentation of the petition to the Board for the purpose of allowing the qualified electors of the County to approve or reject the reapportionment of the supervisors districts as sought by the petitioners.

If approved by a majority of the qualified electors voting, then such plan must be put into effect on the first day of January following such special election. Now, I want to pause here to point out that the timing of that, whether it be a special election or whether it be timed to come on the general election, lies within the hands of the petitioners because they are the ones who present it to the board and the board must call the election within not less than thirty nor more than sixty days from the time it is presented. Now, I state, to a large measure, it is in the hands of the petitioners to determine that to some extent, anyway.

Now, if the Board of Supervisors fail to put the new redistricting plan into effect, if so voted, as provided by Section 2870 of our Code, then they can be required to do so by writ of mandamus. Thus, there is a complete and adequate remedy at law for the conditions complained of here.

There are some other rules of law touching this matter, some of which are basic, and I'll mention some. If there is a remedy by mandamus, injunction will not issue. You haven't reached the point of mandamus yet but if the Board fails to put the new plan

into effect, if it is voted by the majority of the qualified electors voting, then mandamus will issue to require them to do so.

Application for a temporary injunction is addressed to the sound discretion of the Court. Now, this necessarily means a sound judicial discretion. It is not a matter of personal discretion. Our Nation and State are today confronted with many grave and perplexing problems because too many judges, particularly in the Federal appellate courts, have exercised what many able lawyers and judges classify as personal discretion rather than sound judicial discretion.

Section 2870 of our Code, in its ultimate, contemplates the holding of an election and the rule here is that courts should not interfere with the holding of elections except in a most clearly extreme case and then only to prevent abuses. Here again, the very bill before the Court seeks to enjoin an election.

For the reasons stated, the application for temporary injunction will be denied. I will point out one further basic rule and that is that it has long been established that courts will not decide constitutional issues unless it is necessary to do so in deciding the case. As I state, this is a basic rule and I do not find it necessary to meet those issues in the state of the pleadings here today. The temporary injunction will be denied.

BY MR. SISSON: Does your Honor rule on the question or not rule on the question raised on the Fourteenth Amendment?

BY THE COURT:

I rule only as far as necessary for the Court to go and that is that the Bill does not state a case for temporary injunction as the pleadings are now drawn. I sustain the demurrer.

The above and foregoing oral opinion rendered in open court in this cause on the 27th day of February 1963, and is hereby ordered to be filed among the papers in this cause and made a part of the record in this cause in conformity with Rule Number 33 of the Rules in Chancery.

WILLIAM G. HEWES
CHANCELLOR

APPENDIX B

IN THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI.

POWELL GLASS, JR., DR. ANDREW K. MARTINOLICH, JR., AND WILBERT L. ARGUS. . . . . .COMPLAINANTS

VS. NO. 9063

HANCOCK COUNTY ELECTION COMMISSION AND DAN M. RUSSELL, JR. JOHNSON SHAW AND J. ROLAND WESTON, INDIVIDUALLY, AND AS MEMBERS OF HANCOCK COUNTY ELECTION COMMISSION. . . . . .DEFENDANTS

DECREE

This matter coming on to be heard upon petition of Powell Glass, Jr., Dr. Andrew K. Martinolich, Jr., and Wilbert Argus to enjoin the Election Commissioners of Hancock County from holding an election in Hancock County according to the presently existing beat lines of said County and to enjoin them from any acts toward holding an election in Hancock County under the presently existing beat lines, and Answer of the Election Commissioners and General Demurrer by Norton Haas.

The Court having heard and considered oral argument on the General Demurrer and after due deliberation of all of the matters contained in said pleadings, is of the opinion that the said General Demurrer is well taken and should be sustained. It is therefore,

ORDERED, ADJUDGED AND DECREED, that the General Demurrer filed by Norton Haas in his individual capacity and as a member of the Election Commission of Hancock County, be and the same is hereby sustained and that the Bill of Complaint is hereby dismissed.

ORDERED, ADJUDGED AND DECREED, this the 28th day of February, A. D. 1963.

WILLIAM G. HEWES,
CHANCELLOR

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

NO. 42,858

POWELL GLASS, JR. ET AL.

v.

HANCOCK COUNTY ELECTION COMMISSION AND DAN M. RUSSELL, JR., JOHNSON SHAW AND J. ROLAND WESTON, INDIVIDUALLY, AND AS MEMBERS OF HANCOCK COUNTY ELECTION COMMISSION

McELROY, JUSTICE:

This is an appeal from the Chancery Court of Hancock County, Mississippi, wherein the court sustained a general demurrer and dismissed the bill of complaint. The appellants filed their bill of complaint against appellees, Hancock County Election Commission, individually and as members of the Hancock County Election Commission.

The bill alleged that the present existing supervisors districts in Hancock County were designed, created and established more than 100 years ago, and had not since been changed in accordance with material changes of population as reflected by the U. S. Census of 1960; that as a result of failure of the Board of Supervisors to redistrict the beats within the county in accordance and as required by Section 170 of the Mississippi Constitution of 1890 and Section 2870 of the Mississippi Code of 1942, Anno., appellants suffered and continue to suffer irreparable damage in the denial of equal rights and equal protection of the laws guaranteed under the Fourteenth Amendment of the U. S. Constitution; that the failure to redistrict the county amounted to and constituted invidious discrimination against appellants and others similarly situated; that the U. S. Government, through its agency known and designated as "NASA" had appropriated for its use in the development and manufacture of rockets for moon and interplanetary exploration, practically all of District No. 2; therefore said district would almost be wholly without assessible property, either real or personal, and likewise, without a resident freeholder, as required by Section 170 of the Mississippi Constitution, for election to the Hancock County Board of Supervisors; that as

a direct result of the failure to redistrict the county, a justiciable issue has arisen in which the court of equity has jurisdiction.

The complaint further alleges that the presently constituted Board of Supervisors of Hancock County will not redistrict said county in conformity with and as required by law, and that the appellees intend to, and will, unless restrained by the court, conduct the next election for the Board of Supervisors by the present existing illegal, invalid and unconstitutional supervisors district, which said elections would deprive appellants and all others similarly situated, of their rights guaranteed by the Constitution of the State of Mississippi and of the United States.

The bill states that:

(1) They are and will be arbitrarily deprived of liberty and property without due process of law, they will be arbitrarily denied equal protection of the law in violation of the Fourteenth Amendment and Section 4, Article 4, of the Constitution of the United States; and

(2) They will be deprived of liberty and property under Article 3, Section 14 and Article 12, Section 241 of the Mississippi Constitution.

The complaint states that there was no plain and adequate remedy at law, and in their prayer for relief ask for:

(1) Temporary injunction enjoining the commissioners, the appellees, and their successors, from holding elections for beat offices within Hancock County under the present existing districts until such time as the board of supervisors shall redictrict the county in accordance with the applicable laws;

(2) That the appellees, the commission, be directed and required to hold the next general election for beat officers on a county at large basis, or in the alternative, the court enter an order redistricting said county in a manner conforming to the constitutional and statutory requirements; and

(3) That the Commission, the appellees, be further mandatorily enjoined from participating in any manner whatsoever with the election of supervisors in Hancock County, contrary to or other than from such newly created and redistricted supervisors districts.

Two of the commissioners filed an answer to the bill of complaint admitting that they were the commissioners. They admitted that they performed statutory duties and requirements in holding and certification of elections, that the presently exist-

ing supervisors districts were designed, created, and established more than 100 years ago and had not since been changed, notwithstanding material increases in population in certain of supervisors districts as reflected by the U. S. Census of 1960. They admitted the provision of Section 170 of the Constitution and the provision of Section 2870 of the Mississippi Code.

The commission practically admits everything except that they neither admit or deny that there is no plain and adequate remedy at law, nor that the complainants are entitled to relief prayed for, but request directions of the chancery court.

Norton Haas' name was substituted as one of the commissioners in place of Johnson Shaw's, who resigned as one of the election commissioners. Norton Haas filed a demurrer to the bill of complaint stating there is no equity on the face of the bill.

Though they were not made parties to the suit, the Board of Supervisors filed a motion to appear as amicus curiae, that it be permitted to appear and to file such documents as may be appropriate or convenient and to be of assistance to the court, stating:

(1) That the Board of Supervisors are real parties in interest in the litigation, and even though suit is filed against the election commissioners they are not real parties to the suit.

(2) The Board of Supervisors at their meeting of February 25, 1963, unanimously gave evidence of their desire to redistrict the county at a date when the population shall have been permanently relocated, the people of the county now being suspended as to their location either within or without said county as a result of the NASA program.

(3) That when NASA program shall have been completed and the relocation of technicians, laborers, guardsmen, and all of the people associated with the program shall have been relocated, then at that time it would be appropriate to redistrict Hancock County.

(4) A copy of a resolution was attached as Exhibit A, which motion of the Board shows "that the Board of Supervisors shall redistrict the County of Hancock, at such time as the residents of the NASA test site and buffer zone shall be relocated." The above motion was unanimously adopted by the Board February 1963.

(5) That great hardship has been and will be visited upon a large number of people in the county and that the population

is in a complete state of suspended animation.

(6) To redistrict the county at this time is impracticable, unfair, and completely unjust to a large number of people. The request to plead was sustained.

The appellants' case seeks aids of a court of equity because there is clearly no adequate remedy at law. The relief sought is injunctive. The prayer of the bill seeks to enjoin the Hancock County Election Commission from holding further election to beat offices within the county until such time as the Board of Supervisors of said county shall redistrict their county as required by law, or, in the alternative that the court redistrict said county.

Section 170 of the Mississippi Constitution provides:

"Each county shall be divided into five districts, a resident freeholder of each district shall be selected, *in the manner prescribed by law*, and the five so chosen shall constitute the board of supervisors of the county, a majority of whom may transact business. The board of supervisors shall have full jurisdiction over roads, ferries, and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law; provided, however, that the legislature may have the power to designate certain highways as 'state highways,' and place such highways under the control and supervision of the state highway commission, for construction and maintenance. The Clerk of the chancery court shall be the clerk of the board of supervisors."

Section 2870 of the Mississippi Code of 1942 Annotated, Rec., provides:

"Each county shall be divided into five (5) districts, *with due regard to equality of population* and convenience of situation for the election of members of the board of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election, and every four (4) years thereafter, in their district, one member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

"The board, upon the petition of twenty-five per cent (25 %) of the qualified electors of the county, asking that the districts of

the county be changed, or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election.

"Provided, however, that in any county in the state having a supervisors district containing more than fifty per cent (50%) of the population of the county according to the last federal census and /or more than fifty per cent (50%) of the assessed valuation of the county, the issue of the election heretofore provided for shall be determined by a majority of those participating in said election.

"Provided further, however, that in any county in the state bordering on the Gulf of Mexico or Mississippi Sound and having a population in excess of eighty thousand (80,000) according to the last federal census, the issue of the election heretofore provided for shall be determined by a majority of the qualified electors of the county, and if such majority fail to vote affirmatively, no new petition shall be considered for four (4) years. Each such election shall be based upon a petition of twenty-five per cent (25%) of the qualified electors of the county, and to which petition shall be attached a map or plat defining the boundaries of each beat as proposed by said map or plat, and the election thereon shall be on such proposal.

"And the board, whenever a majority of the qualified electors of the county shall have voted to change or alter the existing districts to those set forth and described in the petition, shall at its first meeting thereafter establish said proposed districts by order on its minutes, to be effective on the first day of January following; and in default thereof, may be commanded to do so by writ of mandamus."

The anomalous situation in this case is that the appellants seek the aid of a court of equity because there is clearly no adequate remedy at law. The relief sought is injunction, and to enjoin a governmental party that is not made a party to the suit, i.e., the Board of Supervisors, though the prayer of the bill seeks to enjoin the Hancock Election Commissioners from holding further elections to beat offices until such time as the Board of Supervisors of the county shall redistrict their county as required by law, or, in the alternative, that the court redistrict the county. Section 170 of the Mississippi Constitution provides that each county shall be divided into five districts. Section

2870 of the Mississippi Code prescribes the manner in which the county shall be districted: (1) that the Board by unanimous vote of all members elected or (2) when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided. . .the board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed, or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election . . . .And the board, whenever a majority of the qualified electors of the county shall have voted to change or alter the existing districts to those set forth and described in the petition, shall at its first meeting thereafter establish said proposed districts by order on its minutes. . .and in default thereof, may be commanded to do so by writ of mandamus.

The Election Commissioners, in their answer, stated that the county should be redistricted. The County Board of Supervisors, after being allowed by the chancery court to be made a party to the suit, entered an order to redistrict the county: "That the Board of Supervisors shall redistrict the County of Hancock, at such time as the residents of the NASA test site and buffer zone shall be relocated." The above motion was unanimously adopted by the Board. In other words, the petitioners state that their constitutional rights are being violated and that they do not have an adequate remedy at law, yet recognize Section 2870 of the Mississippi Code, which states further the remedy to which they are entitled at a time when the Board of Supervisors agrees to do what they are praying for. Yet they have at no time requested the Board to redistrict the county, nor have the twenty-five per cent (25%) of the qualified electors of the county petitioned the Board to redistrict the county as required by Section 2870.

The purpose of the demurrer is to test the legal sufficiency of the bill. In other words, does the bill of complaint say enough to allow it to be proved in a court of equity? The court looks to the entire bill in determining its legal sufficiency. The bill asked for injunctive relief, which is an extraordinary remedy, the rule being and established that injunctions will not issue if there is a complete and adequate remedy at law. The appellants recognize Section 170 of the Constitution and Section 2870 of the Code. We be-

lieve that the learned chancellor was correct in finding that Code Section 2870 is a perfect remedy at law. Nowhere in the bill was it contended that this particular section of the Code failed to furnish an adequate remedy for the rights complained of in the bill, nor had they at any time exercised their rights under the Code. The matter of apportionment or reapportionment is essentially a legislative function. The Board of Supervisors is both a quasi-legislative board and a quasi-judicial board. The qualified electors of the county under Section 2870 have a right to request the Board to redistrict the county, or they may, by a petition of twenty-five per cent (25%) of the qualified electors of the county, require the Board of Supervisors to call a special election, and, if after having been approved by a majority of qualified electors voting, the Board of Supervisors fails to put the new redistricting plan into effect, then they can be required to do so by writ of mandamus.

We are of the opinion that the learned chancellor was eminently correct in sustaining the demurrer, simply for the reason that Section 2870 is a complete and adequate remedy at law for the rights complained of and set forth in the bill of complaint. Injunction will not lie where there is a remedy by mandamus.

In the case of E. L. Barnes et al. v. Ross R. Barnett et al., 241 Miss. 206, 129 So. 2d 638, in passing on enjoining a special election on "right to work" constitutional amendment alleging that it was void because it was adopted by the House and Senate when neither of the houses was constituted and apportioned in accordance with the State and Federal Constitutions was insufficient, the Court held:

"The decree was also proper for a second reason, namely, that stated therein: The want of power or jurisdiction in the court to enjoin the holding of an election for submission of a proposed constitutional amendment. The leading case in this state is Power v. Ratliff, 1916, 112 Miss. 88, 72 So. 864. Complainant sought to enjoin the secretary of state from submitting certain initiative measures to the people, under the initiative and referendum amendment to the Constitution (later held to be invalid). It was held that an injunction would not lie to restrain the holding of such an election, since complainants were not affected in their civil and property rights any differently from the general public. The election was a preliminary step, a purely political matter, not affecting the substantial property or civil rights of complainants." Cf. Howard v. Sheldon, 117 So. 839 (enjoining primary election).

The appellants rely on Baker v. Carr, 369 U. S. 186, 7 L. Ed.2d 663, which is the case holding on the question of the Legislature's redistricting the State of Tennessee, in which the appellants had alleged a cause of action. Distinguishing the case from earlier cases dealing with distribution of political powers that a patent violation of the Equal Protection Clause of the United States Constitution has been shown, and that an appropriate remedy may be formulated, the opinion stated: "Tennessee has no initiative and referendum. . . .the majority of the people of Tennessee have no 'practicable opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination.' The majority of the voters have been caught up in a legislative straitjacket. Tennessee has an 'informed, civically militant electorate' and 'an aroused popular conscience', but it does not sear 'the conscience of the people's representatives.' This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented."

The case of Tedesco v. Bd. of Sup'rs of Elections for Parish of Orleans et al., 43 So. 2d 514, is a somewhat analogous controversy. Tedesco brought action for the purpose of having Act No. 234 of 1948 declared unconstitutional. The attack was made on the ground that certain districts in the City of New Orleans had more residents than others, while each district had only one representative, and appellant, Tedesco, invoked the Fourteenth and Nineteenth Amendments. The trial court denied relief, and on appeal, it was confirmed by the Court of Appeals of Louisiana. In Baker v. Carr, the United States Supreme Court held that the decision by the U. S. Supreme Court in Tedesco v. Bd. of Sup'rs of Elections for Parish of Orleans et al. "indicates solely that no substantial federal question was raised by a state court's refusal to offset the districting of city council seats, especially as it was urged that there was a rational justification for the changed districting." In *Tedesco* the court held:

"In the first place, we do not see that by this contention there is raised any question cognizable under the Federal Constitution for the reason, as we have said, that it is well settled that the right to vote in each State is given by the State and may be curtailed by the state or controlled by the state so long as there is no violation of the Fifteenth Amendment or of the Nineteenth Amendment of the Federal Constitution.

"Counsel for plaintiff declare that the Supreme Court of the United States has indicated in two instances that a state may not pass such statute as that which is now before us. They say that that was so indicated in Breedlove v. Suttles, 302 U. S. 277, 58 S. Ct. 205, 82 L.Ed. 252, and Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432. Counsel for defendants, on the other hand, are of the opinion that those cases are authority for the view that that is no violation of any provision of the Federal Constitution, nor of the amendments thereof, unless there results a violation of the provisions of the Fifteenth Amendment, or of the Nineteenth Amendment.

"We have read these cases and find them most confusing, but conclude that there is nothing in either of them to support the contention of plaintiff and that rather they support the view that unless a federal election is involved or unless there is involved a violation of the Fifteenth Amendment or of the Nineteenth Amendment, or unless such a statute brings about an unwarranted and unfair discrimination, there is nothing violative of the Federal Constitution. And we are not at all certain that even if there is an unwarranted discrimination there is a violation of the Federal Constitution, unless it be that the discrimination is based on sex, or race, or color, or previous condition of servitude."

In this case, in 339 U.S.Rep. 940, by unanimous vote it was held: "The motion to dismiss is granted and the appeal is dismissed for want of substantial federal question."

It is to be noted that the election commissioners and the Board of Supervisors of the county admit that the county should be, and will be, redistricted at a more propitious time due to the fact that NASA is taking over the entire Beat 2 for governmental experimental purposes, indicating that there will be a general exodus of the people in that locality. The bill of complaint does not particularize to what extent this change will be. It is possible that there will be more people in that locality than there were before the government took over. In other words, it is hard to see just what way at this time an adequate and just redistricting could be made.

In his concurring opinion in Baker v. Carr, supra, Justice Douglas had this in mind when he said: "The justiciability of the present claims being established, any relief afforded can be fashioned in the light of well-known principles of equity." This statement was expanded in footnote 5, which

says in part:

"The District Court need not undertake a complete reapportionment. It might possibly achieve the goal of substantial equality merely by directing respondent to eliminate the egregious injustices. Or its conclusion that reapportionment should be made may in itself stimulate legislative action. That was the result in Asbury Park Press v. Woolley, 33 N.J. 1, 161 A.2d 705, where the state court ruled it had jurisdiction:

" 'If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The law-making body cannot by inaction alter the constitutional system under which it has its own existence.' 33 N.J., at 14, 167 A.2d, at 711. The court withheld its decision on the merits in order that the legislature might have an opportunity to consider adoption of a reapportionment act. For the sequel see Application of Lamb, 67 N.J.Super 39, 46, 47, 169 A.2d 822, 825-826.

"Reapportionment was also the result in Magraw v. Donovan, 159 F.Supp. 901, where a federal three-judge District Court took jurisdiction, saying, 163 F.Supp. 184, 187:

" 'Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes. . . .Early in January 1959 the 61st Session of the Minnesota Legislature will convene, all of the members of which will be newly elected on November 4th of this year. The facts which have been presented to us will be available to them. It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of the Court to grant relief), in order to afford the Legislature full opportunity to "heed the constitutional mandate to redistrict." '

"See 177 F. Supp. 803, where the case was dismissed as moot, the State Legislature having acted."

We are of the opinion that the Chancellor was right in sustaining the demurrer for the reason that the appellants have an adequate remedy at law under Section 170 of the Mississippi Constitution and Section 2870 of the Mississippi Code

of 1942, Rec.

The case is therefore affirmed.

AFFIRMED.

LEE, P.J., AND RODGERS, JONES AND BRADY, JJ., CONCUR.

APPENDIX D

MONDAY, OCTOBER 21, 1963, COURT SITTING::

POWELL GLASS, JR., ET AL.

NO. 42,858 vs.

HANCOCK COUNTY ELECTION COMMISSIONERS, ET AL.

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Hancock County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court (sic) rendered in this cause on the 28th day of February 1963-be and the same is hereby affirmed. It is further ordered and adjudged that the appellees do have and recover of and from the appellants all of the costs of this appeal to be taxed.

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APPENDIX E

2870. DISTRICTS AND BOUNDARIES.

Each county shall be divided into five (5) districts, *with due regard to equality of population* and convenience of situation for the election of members of the boards of supervisors, but the districts as now existing shall continue until changed. The qualified electors of each district shall elect, at the next general election and every four (4) years thereafter, in their district, one member of the board of supervisors; and the board, by unanimous vote of all members elected or when so ordered by a vote of the majority of the qualified electors of the districts affected voting in an election as hereinafter provided, may at any time, except as hereinafter provided, change or alter the district, the boundaries to be entered at large in the minutes of the proceedings of the board.

The board, upon the petition of twenty-five per cent (25%) of the qualified electors of the county, asking that the districts of the county be changed or altered, and setting out in such petition the changes, or alterations desired, shall call a special election for a date which shall be not less than thirty (30), nor more than sixty (60) days from the date of the presentation of the petition to the assembled board. A majority of the qualified electors of the county shall determine the issue of such election.

Provided, however, that in any county in the state having a supervisors district containing more than fifty per cent (50%) of the population of the county according to the last federal census and /or more than fifty per cent (50%) of the assessed valuation of the county, the issue of the election heretofore provided for shall be determined by a majority of those participating in said election.

Provided further, however, that in any county in the state bordering on the Gulf of Mexico or Mississippi Sound and having a population in excess of eighty thousand (80,000) according to the last federal census the issue of the election heretofore proviced for shall be determined by a majority of the qualified electors of the county, and if such majority fail to vote affirmatively, no new petition shall be considered for four (4) years. Each such election shall be based upon a petition of twenty five per cent (25%) of the qualified electors of the county, and to which petition shall be attached a map or plat defining the boundaries of each beat as proposed by said map or plat,

and the election thereon shall be on such proposal.

And the board, whenever a majority of the qualified electors of the county shall have voted to change or alter the existing districts to those set forth and described in the petition shall at its first meeting thereafter establish said proposed districts by order on its minutes, to be effective on the first day of January following; and in default thereof, may be commanded to do so by writ of mandamus.

When the districts are changed, by the qualified electors in an election as aforesaid, the board, of its own motion, shall not change or alter said districts within four (4) years thereafter.

This act shall not be construed to affect any supervisor now holding office until the expiration and end of his present term of office.

APPENDIX F

Section 170. Each county shall be divided into five districts, a resident freeholder of each district shall be selected, *in the manner prescribed by law*, and the five so chosen shall constitute the board of supervisors of the county, a majority whom may transact business. The board of supervisors shall have full jurisdiction over roads, ferries, and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law; provided, however, that the legislature may have the power to designate certain highways as "state highways," and place such highways under the control and supervision of the state highway commission, for construction and maintenance. The clerk of the chancery court shall be the clerk of the board of supervisors.

APPENDIX G

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.